Majlis Agama Islam dan Adat Melayu Perak Darul Ridzuan v Mohamed Suffian bin Ahmad Syazali & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02(IM)(NCVC)-3–01 OF 2013
ABDUL AZIZ ABD RAHIM, MOHAMAD ARIFF AND DAVID WONG JJCA
10 JANUARY 2014

Civil Procedure — Jurisdiction — Matters relating to Islamic religion — Appeal against decision of High Court — Termination of chairman of mosque — Whether appointment lawful and constitutional — Whether civil courts had jurisdiction to try dispute — Issue of administrative law — Whether action properly brought as writ action instead of judicial review application — Rules of the High Court 1980 O 53

The present appeal arose from an action concerning the termination of the respondent ('the plaintiff') as the *Pengerusi Jawatankuasa Kariah bagi Masjid Al-Aulia* ('Pengerusi'). The respondent had been appointed by the appellant, Majlis Agama Islam dan Adat Melayu Perak Darul Ridzuan ('MAIP') to this position for a duration of three years commencing on 1 July 2009 until 30 June 2012. However, the appointment letter was superseded by another letter from Jabatan Agama Islam Negeri Perak ('JAIP') which purportedly terminated the plaintiff's appointment and appointed the second defendant. The plaintiff maintained that he continued to remain as the *Pengerusi* since his appointment was made by MAIP and therefore, the termination by JAIP was unlawful, null and void, unconstitutional and in breach of natural justice. In the present appeal, MAIP appealed against the decision of the judicial commissioner ('JC') of the High Court who dismissed with costs the appellant's application to set aside the plaintiff's writ of summons and statement of claim under O 18 r 19(1)(b) and/or (d), of the Rules of the High Court 1980 ('RHC'). MAIP argued that given the subject matter which concerned the running of a masjid, the civil courts did not have jurisdiction to try the dispute; and that the action had been improperly brought as a writ action instead of a judicial review application under O 53 of the RHC since this was an issue of administrative law.

Held, allowing the appeal:

(1) It was plain from the wording of s 50 of the Enactment that the Syariah High Court in Perak had no express jurisdiction to adjudicate on a matter touching and concerning the appointment and termination of the mosque officials or the members of the Jawatankuasa Kariah Masjid. The

issue was not really one of which court had the jurisdiction to grant the remedy prayed. There had to be two levels of judicial enquiry – first, at the level of legislative competency, and secondly, at the level of the jurisdiction of the courts. Although both were statutory creations, no jurisdiction could be conferred by federal law on the civil courts on matters which were within the legislative competency of the states, and vice versa (see paras 28 & 30).

(2) Given the structure of the Federal Constitution, there could very well be areas of perceived overlapping jurisdictions between the Syariah and the civil courts. The essential issue to determine was what precisely was the 'core' or putting it slightly differently, the 'pith and substance' of the disputed subject matter, not so much whether the civil courts have the correct and applicable remedy (see para 33).

(3) On the facts of this present appeal, the dispute was on the relatively mundane issue of whether the termination of the respondent as the *Pengerusi Jawatan kuasa Kariah Masjid Al-Aulia* was lawful. It had little to do with Islamic law in connection with mosques. It did not even concern the qualifications of a person to act as *Imam* or *Bilal* under Islamic law, for the respondent was not one. The subject matter concerned the administration of a mosque no doubt, but the 'pith and substance' was one of administrative law, for which the civil courts were the proper fori (see para 34).

(4) It was an established proposition that a failure to comply with O 53 would result in an abuse of process for which the claim could be struck out. There could nevertheless be exceptions to the rule, such as where the dispute evidently involved a private law matter or where the plaintiff was asking for a declaration of status, or where the elements of public and private laws were present but the element of private law was more predominant. In any event, each case was very much 'fact-based' (see paras 42–43).

(5) Based on these principles and the exhortation that a court had to be circumspect in allowing a public law matter to be proceeded by a procedure other than an application for judicial review, and considering the total circumstances of this case and the nature of the respondent's claim, although couched in the language of applying for a declaration of 'status', this was a case that should have been filed as an application for judicial review under O 53 of the RHC. There was absent any significant private law element, and was almost wholly exclusively centred on a public law argument on absence of statutory jurisdiction (on the part of JAIP) and breach of the rules of natural justice (see para 44).

[Bahasa Malaysia summary

Rayuan ini timbul daripada tindakan berkaitan penamatan responden ('plaintif') sebagai Pengerusi Jawatankuasa Kariah bagi Masjid Al-Aulia ('Pengerusi'). Responden telah dilantik oleh perayu, Majlis Agama Islam dan Adat Melayu Perak Darul Ridzuan ('MAIP') untuk jawatan ini bagi tempoh tiga tahun bermula dari 1 Julai 2009 hingga 30 Jun 2012. Walau bagaimanapun, surat pelantikan itu telah digantikan oleh surat lain daripada Jabatan Agama Islam Negeri Perak ('JAIP') yang kononnya menamatkan pelantikan plaintif dan melantik defendan kedua. Plaintif menegaskan bahawa dia terus kekal sebagai Pengerusi sejak pelantikannya dibuat oleh MAIP dan oleh itu, penamatan oleh JAIP adalah menyalahi undang-undang, terbatal dan tidak sah, tidak mengikut perlembagaan dan melanggar keadilan asasi. Dalam rayuan ini, MAIP merayu terhadap keputusan pesuruhjaya kehakiman ('PK') Mahkamah Tinggi yang telah menolak dengan kos permohonan perayu untuk mengetepikan writ saman dan penyataan tuntutan plaintif di bawah A 18 k 19(1)(b) dan/atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). MAIP berhujah bahawa berdasarkan hal perkara yang berkaitan penyelenggaraan masjid, mahkamah sivil tiada bidang kuasa untuk membicarakan pertikaian itu; dan bahawa tindakan itu tidak wajar dimulakan sebagai writ tindakan dan bukan permohonan semakan kehakiman di bawah A 53 KMT kerana ini adalah isu undang-undang pentadbiran.

Diputuskan, membenarkan rayuan:

(1) Adalah jelas daripada ayat s 50 Enakmen itu bahawa Mahkamah Tinggi Syariah di Perak tiada bidang kuasa sedia ada untuk mengadili perkara berhubung dan berkaitan pelantikan dan penamatan pegawai-pegawai atau ahli-ahli masjid Jawatankuasa Kariah Masjid. Isu itu bukan suatu yang mahkamah mempunyai bidang kuasa untuk memberikan remedi yang dipohon. Perlu ada dua tahap siasatan kehakiman — pertama, di tahap kecekapan perundangan, dan kedua, di tahap bidang kuasa mahkamah. Walaupun kedua-duanya adalah ciptaan statutori, tiada bidang kuasa boleh diberikan oleh undang-undang persekutuan berhubung hal perkara yang dalam kecekapan perundangan kerajaan negeri, dan sebaliknya (lihat perenggan 28 & 30).

(2) Berdasarkan struktur Perlembagaan Persekutuan, pasti terdapat bidang yang dilihat sebagai bidang kuasa bertindan antara mahkamah-mahkamah Syariah dan sivil. Isu penting untuk ditentukan adalah apakah sebenarnya 'core' atau dimaksudkan sedikit berbeza, sebagai 'pith and substance' hal perkara yang dipertikaikan, dan bukan sama ada mahkamah sivil mempunyai remedi yang betul dan terpakai (lihat perenggan 33).

(3) Berdasarkan fakta rayuan ini, pertikaian itu adalah berhubung isu yang agak biasa tentang sama ada penamatan responden sebagai Pengerusi

Jawatankuasa Kariah Masjid Al-Aulia adalah sah. Ia tidak banyak tentang undang-undang Islam berkaitan dengan masjid. Ia tiada kaitan dengan kelayakan seseorang untuk bertindak sebagai Imam atau Bilal di bawah undang-undang Islam, kerana responden bukan begitu. Hal perkara itu berkaitan pentadbiran masjid tidak diragui, tetapi 'pith and substance' itu adalah tentang undang-undang pentadbiran, yang mana mahkamah sivil adalah forum yang sepatutnya (lihat perenggan 34).

(4) Adalah kenyataan terbukti bahawa kegagalan untuk mematuhi A 53 akan mengakibatkan penyalahgunaan proses di mana tuntutan boleh dibatalkan. Namun begitu terdapat pengecualian kepada peraturan itu, seperti jika pertikaian jelas melibatkan perkara undang-undang swasta atau di mana plaintif disoal tentang deklarasi status, atau di mana elemen-elemen undang-undang awam dan swasta wujud tetapi elemen undang-undang swasta lebih utama. Dalam apa-apa keadaan, setiap kes lebih 'fact-based' (lihat perenggan 42–43).

(5) Berdasarkan prinsip-prinsip tersebut dan desakan bahawa sebuah mahkamah perlu berwaspada dalam membenarkan perkara undang-undang awam dimulakan melalui prosedur selain daripada permohonan untuk semakan kehakiman, dan mengambil kira keadaan keseluruhan kes ini dan sifat tuntutan responden, meskipun diselaraskan dalam bahasa untuk memohon suatu deklarasi 'status', ini adalah kes yang patut difailkan sebagai permohonan untuk semakan kehakiman di bawah A 53 KMT. Tiada apa-apa elemen undang-undang swasta, dan hampir keseluruhannya secara eksklusif tertumpu kepada hujah undang-undang awam mengenai ketiadaan bidang kuasa statutori (di pihak JAIP) dan pelangaran rukun keadilan asasi (lihat perenggan 44).]

Notes

For a case on matters relating to Islamic religion, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) para 5415.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ M Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)

Barkath Ali bin Abu Backer v Anwar Kabir bin Abu Backer & Ors [1997] 4 MLJ 389, FC (refd)

Kamal Ariff bin Hj Abdul Rahim v Majlis Agama Islam Negeri Pulau Pinang [2011] 4 MLJ 102, HC (refd)

Latifah bte Mat Zain v Rosmawati bte Sharibun & Anor [2006] 4 MLJ 705, CA (refd)

Latifah bte Mat Zain v Rosmawati bte Sharibun & Anor [2007] 5 MLJ 101, FC (refd)

Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Anor [1996] MLJU 500, HC (refd)

Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaikh Zolkaffily bin Shaik Natar & Ors [2003] 3 MLJ 705; [2003] 3 CLJ 289, FC (refd)
Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur [1998] 1 MLJ 681; [1997] 4 CLJ Supp 419, HC (refd)
O'Reilly v Mackman and others and other cases [1982] 3 All ER 1124, HL (refd)
Saravanan a/l Thangathoray v Subashini a/p Rajasingam [2007] 2 MLJ 705, CA (refd)
Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor [1999] 1 MLJ 489; [1999] 3 CLJ 539, FC (refd)
Wan Khairani binti Wan Mahmood v Ismail bin Mohamad & Anor [2008] 1 MLJ 164, CA (refd)

Legislation referred to

Enakmen Pentadbiran Agama Islam (Perak) 2004 ss 50, 67(2), 89, 91
Federal Constitution arts 73, 74, 121, 121(1A) Ninth Schedule, Federal List I, List II, Item 1
Kaedah-Kaedah Jawatankuasa Kariah 1998 s 67(2)
Rules of the High Court 1980 O 15 r 16, O 18 r 19(1)(b), (d), O 53, O 53 r 2(2), (3)

Appeal from: Writ of Summons No 22NCVC-206–09 of 2011 (High Court, Ipoh)

Zainul Rijal bin Abu Bakar (Nur Syazwani bt Rosli with him) (Zainul Rijal Talha & Amir) for the appellant.
Mohd Fitri bin Asmuni (Awi & Co) for the respondent.

Mohamad Ariff JCA (delivering judgment of the court):

INTRODUCTION AND BACKGROUND FACTS

[1] *Majlis Agama Islam dan Adat Melayu Perak Darul Ridzuan* ('MAIP'), the appellant here, appeals against the decision of the learned Judicial Commissioner of the High Court, Ipoh, who dismissed with costs the appellant's application by summons in chambers to set aside the plaintiff's writ of summons and statement of claim under O 18 r 19(1)(b) and/or (d), of the Rules of the High Court 1980. The application appears as encl 7 in the court record (p 55–57 of the appeal record, Vol 1). The subject matter of the action concerns the termination of the respondent's (the plaintiff in the court below) appointment as *Pengerusi Jawatankuasa Kariah bagi Masjid Al-Aulia* ('Pengerusi'), as appears in the pleaded case, in particular para 4 of the statement of claim.

[2] The plaintiff/respondent had been appointed to this position by MAIP by a letter of appointment dated 30 November 2009 for a duration of three years commencing 1 July 2009 until 30 June 2012. This appointment letter was however superseded by another letter dated 13 June 2011 which purportedly terminated the plaintiff's appointment and appointed another person (Syed Alaudin bin Syed Daud, the second defendant) to replace the plaintiff as the *Pengerusi of Masjid Al-Aulia*, effective from 21 April 2011 to 30 June 2012. This subsequent letter was not sent by MAIP but by *Jabatan Agama Islam Negeri Perak* ('JAIP').

THE PLAINTIFF'S/RESPONDENT'S PLEADED CASE

[3] As part of his pleaded case, the plaintiff averred that he came to know the reason provided for the new appointment was that he had allegedly resigned as the *Pengerusi*. He denies this allegation. The plaintiff maintains he continues to remain as the *Pengerusi* since his appointment was made by MAIP. The termination by JAIP is therefore unlawful, null and void. He further claims the process for his purported termination as the *Pengerusi* was unconstitutional, and in breach of natural justice, he not being accorded any right of prior hearing. He argues the purported termination was, as a result, oppressive, since he had not been in breach of any law when performing his duties as the *Pengerusi*.

[4] This is how he has pleaded these various averments in his statement of claim:

> 9 Plaintif juga menegaskan bahawa Plaintif masih tetap lagi merupakan Pengerusi Masjid tersebut yang sah di sisi undang-undang kerana perlantikan Plaintif sebagai Pengerusi Masjid tersebut telah dibuat oleh Defendan pertama dan bukannya oleh JAIP.
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> 10 Plaintif sekali lagi menegaskan bahawa JAIP tidak mempunyai sebarang otoriti dan/atau bidang kuasa untuk menamatkan perkhidmatan Plaintif sebagai Pengerusi Masjid tersebut dan menyatakan sebagai menyalahi undang-undang kerana bertindak di luar bidang kuasa JAIP menamatkan perlantikan Plaintif sebagai Pengerusi Masjid tersebut sedangkan perlantikan Plaintif sebagai Pengerusi Masjid tersebut tidak mempunyai sebarang kaitan dengan JAIP. Justeru, Plaintif menegaskan bahawa penamatan Plaintif sebagai Pengerusi Masjid tersebut oleh JAIP adalah tidak sah, terbatal dan tertolak.
>
> 11 Selain itu, Plaintif turut menyatakan bahawa proses yang digunakan oleh JAIP menamatkan perlantikan Plaintif sebagai tidak berperlembagaan kerana tindakan tersebut dibuat tanpa Plaintif diberikan sebarang peluang untuk didengar, membela diri dah hak bersuara.

[5] The plaintiff seeks declaratory reliefs as well as damages (general and exemplary) against the appellant in this writ action.

SETTING ASIDE APPLICATION BY SECOND DEFENDANT

[6] On the facts of this appeal, it is noteworthy that there was another application to strike out the claim made by the second defendant. That was allowed by the High Court, basically on the ground that there was no cause of action and no causal link between the plaintiff and the second defendant. This aspect of the case is not on appeal.

BASIS OF THE PRESENT APPEAL

[7] The appellant has brought and argued this appeal on a two-pronged basis: (a) given the subject matter which concerns the running of a masjid, the civil courts do not have jurisdiction to try this dispute, and (b) as an alternative ground, the action has been improperly brought as a writ action instead of a judicial review application under O 53 of the Rules of the High Court 1980 since this is an issue of administrative law. The respondent disputes ground (a), and as for ground (b), maintains that the prayers are for declaratory relief for an action which contains private law elements, and as such it is permissible to file a claim by writ rather than a judicial review application.

THE HIGH COURT DECISION

[8] The High Court, in a concise decision, allowed the setting aside application by the second defendant (as earlier alluded to), but dismissed the appellant's application under O 18 r 19(1)(b) and (d). The relevant part of the judgment is brief enough to quote in full below:

> As for the first defendant's application, learned counsel submitted on two issues ie that the Civil Court has no jurisdiction over the matter being one with regard to administration of mosques which come within the jurisdiction of the Syariah High Court and secondly, that the plaintiff ought to have filed for judicial review to quash the decision to terminate him. Time has obviously run out for the plaintiff for an order of certiorari and I do not see how and why the plaintiff should be disallowed to file a writ action for a declaration arising from a purported wrongful and illegal termination of his services. I take a leaf from p 118 of the case *Kamal Ariff bin Hj Abdul Rahim v Majlis Agama Islam Negeri Pulau Pinang* [2011] 4 MLJ 102 with facts that are on all fours with our instant case and where the Malaysian High Court Practice 2006, Desk Edition 1, was referred to and underscores the court's unlimited jurisdiction to grant a declaration under O 15 r 16 of the RHC subject only to its own discretion. A declaration can be used to ascertain and determine the rights of parties or to determine a point of law or in place of an order of certiorari especially where the time to apply for the prerogative order has expired. In *Ali bin Abu Backer v Anwar Kabir bin Abu Backer & Ore* [1997] 4 MLJ 389, it was held that the Syariah Court had no power to grant the relief applied for by the plaintiff because according to the Specific Relief Act 1950 and O 15 r 16 of the RHC, the power to grant a declaratory decree was that of the High Court. I am inclined to adopt this decision

A and to view the plaintiff's claim on the remedy basis rather than the subject matter which anyhow is premised upon a termination of a contract of service/employment. The order asked for is for a declaration and the Syariah Court has clearly no jurisdiction or power to grant such an order. Whether the plaintiff will succeed or not eventually is another matter.

B On a final note, the first defendant cannot say that the wrong procedure has been followed by not filing for judicial review and at the same time submits that this Court has no jurisdiction. The application by the first defendant … is hence dismissed with costs …

C **[9]** From the passage taken from the judgment of the High Court, it is evident that the entire thrust of the decision seems to rest on the 'unlimited' jurisdiction of the High Court to grant discretionary orders 'subject only to its own discretion'. This jurisdiction, it is held, extends even to a situation when a declaratory order is made 'in place of an order of certiorari especially where the
D time to apply for the prerogative order has expired'. From this premise, the learned judicial commissioner concludes that since only the civil courts is invested with this jurisdiction, and viewing the plaintiff's claim on a 'remedy basis' rather than 'subject matter', the Syariah High Court 'has clearly no
E jurisdiction'. Two previous High Court decisions figure almost exclusively in the judgment: *Kamal Ariff bin Hj Abdul Rahim v Majlis Agama Islam Negeri Pulau Pinang* [2011] 4 MLJ 102, and *Ali bin Abu Backer v Anwar Kabir bin Abu Backer & Ors* [1997] 4 MLJ 389, with the first decision said to be 'on all fours' with the facts of this present appeal.

F **[10]** The second ground is given short shrift — the appellant here cannot be permitted to submit a wrong procedure is used, when in the first place they are challenging the jurisdiction of the civil courts to hear this case. For reasons to be analysed below, we are unable to fully agree with the entire reasoning of the
G learned judicial commissioner. whilst we may agree the facts of this dispute lie within the jurisdiction of the civil courts, we do so for different reasons, which we feel, with respect, will better recognise the full breadth of the submissions of the parties. The jurisdiction to grant declaratory orders is just one of the several considerations for us to judicially consider. As for the matter of a wrong
H procedure being used (writ instead of judicial review application), we see no inherent inconsistency in the argument. After all, this is submitted by the appellant as an alternative argument.

[11] We now address the detailed arguments of the parties on both counts.

I

THE JURISDICTION ARGUMENT

[12] The appellant advances the argument that it is to the subject matter of the dispute that the court should address, not the remedy, as was done by the

High Court. Counsel quotes the Federal Court decision in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaikh Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705; [2003] 3 CLJ 289 (approving *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur* [1998] 1 MLJ 681; [1997] 4 CLJ Supp 419) and *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor* [1991] 1 MLJ 489; [1999] 3 CLJ 539, in support of this approach.

[13] Counsel cites the following passage from in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaikh Zolkaffily bin Shaik Natar & Ors*, which stresses the important legal point that if a legislative subject matter lies within the jurisdiction of the Syariah Court, the absence of an express provision, including any provision on remedy, in the relevant state Enactment on it, does not confer that jurisdiction on a civil court:

> By virtue of para 1 in List II of Ninth Schedule to the Federal Constitution, the jurisdiction lies with the Syariah Court on its wider jurisdiction over persons professing the religion of Islam even if no express provisions are provided in the Act because under Art 74 of the Federal Constitution, it is within the legislative competency of the legislature to legislate on the matter. Its absence from the express provision in the Act would not confer the jurisdiction in the Civil Court. The fact that Plaintiff may not have his remedy in the Syariah Court would not make the jurisdiction exercisable by the Civil Court.

[14] The holding of the Court of Appeal in *Latifah bte Mat Zin v Rosmawati Sharibun* [2006] 4 MLJ 705; [2006] 3 CLJ 207 is further referred to for the proposition that 'where there is a legislative jurisdiction, judicial jurisdiction follows'. For reasons to be elaborated later, this particular proposition may now have to be viewed in light of subsequent pronouncements by our courts.

[15] The sequence of the argument articulated by the appellant is simple enough. The dispute here concerns the termination of a mosque official, *'pegawai masjid'*. The appointment and termination of his position are matters regulated by State Enactment and the Regulations made thereunder, which in the present case are the Enakmen Pentadbiran Agama Islam (Perak) 2004 and the Kaedah-Kaedah Jawatankuasa Kariah 1998 (Pindaan 2009).

[16] The subject matter concerns the regulation and administration of mosques, which under the Federal Constitution lies within the legislative competency of the states. In this regard, the argument enters into the much-debated area of conflict of constitutional jurisdiction between the civil courts and the Syariah Courts, and a consideration of art 121 (in particular 121(1A)), 73, 74, and Lists I and II of the Ninth Schedule of the Federal Constitution.

[17] List II — the State List, it is argued, includes matters relating to mosques, as can be seen from the following excerpt from Item 1 of the list:

> 1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including *the Islamic law relating to* succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trust; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the state; Malay customs; Zakat, Fitrah and Baitumal or similar Islamic religious revenue; *mosques or any Islamic public places of worship*, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; *the constitution, organisation and procedure of Shariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred bv federal law*, the control of propagating doctrines and beliefs amongst persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom. (Emphasis added.)

[18] As far as the relevant State Enactment is concerned, the appellant cites ss 89 and 91 of the earlier stated *Enakmen Pentadbiran Agama Islam (Perak) 2004*. Section 89 reads:

> (1) Bagi tiap-tiap masjid di dalam Negeri Perak Darul Ridzuan hendaklah dilantik seorang atau beberapa orang Imam, Bilal dan Pembantu Bilal.
>
> (2) Bagi tiap-tiap masjid, yang ditetapkan oleh Duli Yang Maha Mulia Sultan selepas berunding dengan Majlis, Imam dan Bilal hendaklah dilantik daripada anggota perkhidmatan awam Negeri Perak Darul Ridzuan.
>
> (3) Bagi tiap-tiap masjid yang tidak ditetapkan di bawah subseksyen (2), Majlis hendaklah melantik Imam dan Bilal daripada kalangan ahli kariah masjid itu …

[19] Section 91 of the Enactment further provides:

> (1) Perlantikan seseorang Pegawai Masjid selain Imam dan Bilal bagi masjid yang ditetapkan di bawah seksyen 89(2) disifatkan telah dilantik di bawah subseksyen 85(5) sebagai Pegawai Masjid boleh ditamatkan dengan notis bertulis oleh Majlis …

[20] Relying on the above provisions, the appellant submits only the Syariah Courts have jurisdiction to decide on matters relating to the appointment and termination of mosque officials. If we understand counsel for the appellant correctly, the appellant is taking the position that even persons appointed to the *Jawatankuasa Kariah* are *'pegawai masjid'*, and have to be treated on the same basis.

[21] We have been referred to the relevant rules bearing on the appointment and termination of members of the *Jawatankuasa Kariah, namely the Kaedah-Kaedah Jawatankuasa Kariah 1998 (Pindaan 2009)*, which has been earlier alluded to. These Rules are made pursuant to s 67(2) of the Enactment.

[22] We feel it is very pertinent to place this present dispute in context and proper perspective, and in this regard, the exact provisions in these Rules become highly significant. We quote below the relevant provisions:

Kaedah 3 Pelantikan dan keanggotaan Jawatankuasa Kariah.

(1) Pegawai Tadbir Agama dan Penghulu setelah berunding dengan Orang Besar Jajahan, hendaklah mencadangkan kepada Majlis melalui Pengerusi Jawatankuasa Agama Islam, ahli Jawatankuasa Kariah bagi jawatan yang dinyatakan dalam subkaedah (2)(a) hingga (j) dalam Borang JK1 Jadual Pertama.

(2) Jawatankuasa Kariah hendaklah terdiri daripada:

(a) Seorang Pengerusi;

(b) Seorang Timbalan Pengerusi;

(c) Seorang Setiausaha;

(d) Seorang Penolong Setiausaha;

(e) Seorang Bendahari;

(f) Seorang wakil belia;

(g) Dua orang wakil wanita;

Di mana terdapat lebih daripada satu masjid dalam sesuatu kariah seorang wakil daripada masjid yang tidak dijadikan jawatankuasa kariah;

(h) Seorang wakil daripada tiap-tiap surau di dalam sesuatu kariah;

(i) Seorang wakil dari kalangan Imam Masjid; dan

(j) Tidak lebih daripada 5 orang biasa yang dilantik oleh Majlis …

Kaedah 4 Kelayakan ahli Jawatankuasa Kariah.

Seseorang adalah layak dilantik sebagai ahli Jawatankuasa Kariah jika dia —

(a) Ahli kariah;

(b) Berbudi pekerti tinggi;

(c) Bukan seorang yang bankrap; dan

(d) Tidak pernah disabitkan dengan apa-apa kesalahan di bawah mana-mana undang-undang bertulis yang boleh di hukum dengan pemeranjaan selama 6 bulan atau lebih …

Kaedah 6 Tempoh pelantikan, penamatan dan peletakan jawatan ahli Jawatankuasa Kariah

(1) Pelantikan seseorang ahli Jawatankuasa Kariah hendaklah bagi suatu tempoh tidak melebihi 3 tahun dan Majlis boleh, pada bila-bila masa, menamatkan pelantikan tersebut tanpa memberi apa-apa sebab.

(2) Seseorang ahli Jawatankuasa Kariah boleh, pada bila-bila masa, meletakkan jawatannya melalui suatu notis bertulis yang dialamatkan kepada Pengerusi atau Setiausaha dengan satu salinan kepada Majlis.

'Kariah' and 'Ahli Kariah' are defined:

Kaedah 2 Tafsiran

…

'ahli kariah' ertinya seseorang yang secara tetap atau pada lazimnya tinggal dalam kariah masjid.

'kariah' atau 'kariah masjid' berhubungan dengan masjid ertinya kawasan atau sempadan yang ditentukan di bawah seksyen 63 Enakmen di mana masjid itu berada …

[23] As the context and the above-quoted provisions will testify, the present dispute filed by the respondent is not really in relation to his position as *Imam* or *Bilal* or assistant *Imam* or assistant *Bilal*, but is more concerned with his position as *Pengerusi Jawatankuasa Kariah Masjid Al-Aulia*, a position which appears to be more administrative in character, and by virtue of him principally being resident in the *Kariah* (a determined area in which the mosque is located).

[24] The appellant argues the dispute concerns 'the Islamic law relating to … mosques …' within the definition of Item 1, List II of the Ninth Schedule of the Federal Constitution. This interpretation of Item 1, we feel, may not be very correct. Properly read, the legislative competency of the States, in relation to mosques, arises not because a matter of Islamic law is involved but more on the more straightforward basis that 'mosques and any other Islamic public places of worship' are placed constitutionally within the legislative competency of the State Legislature. The interposition of a semi-colon instead of a comma after the following words (in particular, after the word 'trust') makes this apparent:

… Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trust; …

[25] The reference to 'Islamic law' relates directly to Islamic law generally

and more specifically to personal and family law of Muslims, including Islamic law relating to 'succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trust.'

[26] Surprisingly, even counsel for the respondent has interpreted this particular part of Item 1 in the same way as counsel for the appellant, but learned counsel for the respondent then proceeds to submit that the dispute at hand does not concern Islamic law relating to mosques, but is a pure matter of 'private law' or 'administrative law'.

[27] As for the jurisdiction of the Syariah Court, counsel for the respondent has persuasively argued that the more recent pronouncements of our courts have laid down the proposition that legislative competency does not automatically result in judicial jurisdiction. In other words, although the Perak State Legislative Assembly may have legislative competency to legislate with respect to mosques and other Islamic public places of worship, this constitutional competency does not immediately translate to confer judicial jurisdiction on the Syariah Courts in Perak to decide on all matters affecting mosques and other public Islamic places of worship. For this to happen, there has to be express law passed by the State Legislature, but the available express law on the jurisdiction of the Syariah Courts in Perak, s 50 of the Enakmen Pentadbiran Agama Islam (Perak) 2004, is limited to matters specified in that section of the Enactment. The more immediate part — the provision referring to the Syariah Court's jurisdiction in matters of *'mal'* (civil law) — provides:

50(3) Mahkamah Tinggi Syariah hendaklah.

(a) …

(b) dalam bidangkuasa malnya, mendengar dan memutuskan semua tindakan dan prosiding jika semua pihak dalam tindakan atau prosiding itu adalah orang Islam dan tindakan atau prosiding itu adalah berhubung dengan —

(i) pertunangan, perkahwinan, rujuk, perceraian, pembubaran perkahwinan (fasakh), nusyuz, atau pemisahan kehakiman (faraq) atau apa-apa perkara yang berkaitan dengan perhubungan antara suami dan isteri;

(ii) apa-apa pelupusan atau tuntutan harta yang berbangkit daripada mana-mana perkara yang dinyatakan dalam subperenggan (i);

(iii) nafkah orang-orang tanggungan, kesahtarafan, atau penjagaan ataujagaan (hadhanah) budak-budak;

(iv) pembahagian atau tuntutan sepencarian;

(v) wasiat atau alang yang dibuat semasa marad-al-maut;

(vi) alang semasa hidup, atau penyelesaian yang dibuat tanpa balasan yang memadai dengan wang atau nilaian wang oleh seorang orang Islam;

(vii) wakaf atau nazar;

(viii) pembahagian dan pewarisan harta bemasiat atau tak berwasiat;

(ix) penentuan orang yang berhak kepada bahagian harta pusaka seseorang si mati yang beragama Islam atau bahagian-bahagian yang kepadanya masing-masing orang itu berhak;

(x) perisytiharan bahawa seseorang itu bukan lagi orang Islam;

(xi) perisytiharan bahawa seseorang yang telah mati itu ialah seorang Islam atau sebaliknya pada masa kematiannya; dan

(xii) perkara-perkara lain yang berkenaan dengannya bidangkuasa diberikan oleh mana-mana undang-undnag bertulis.

[28] It is plain from the wording of s 50 of the Enactment that the Syariah High Court in Perak has no express jurisdiction to adjudicate on a matter touching and concerning the appointment and termination of the mosque officials or the members of the *Jawatankuasa Kariah Masjid*. As far as the case law is concerned, we are urged by respondent's counsel to consider the decision of our courts decided after *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaikh Zolkaffily bin Shaik Natar & Ors, Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur* and *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor*,. We are requested in particular to consider the Federal Court decision in *Latifah bte Mat Zain v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101, as well as *Saravanan a/l Thangathoray v Subashini a/p Rajasingam* [2007] 2 MLJ 705, which, according to counsel, have abandoned the approach of 'subject matter jurisdiction'. We are also referred to the much earlier decision of Abdul Hamid J (as His Lordship then was) in *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Anor* [1996] MLJU 500, which, it is said, represents the better view.

[29] The judgment of the Federal Court in *Latifah bte Mat Zain*, is most comprehensive. We can do no better except to adopt the following passage in the judgment (per Abdul Hamid FCJ) as representing the correct legal position:

> … What it means is that, the Legislature of a State, in making law to 'constitute' and 'organise' the Syariah Courts shall also provide for the jurisdictions of such courts within the limits allowed by item 1 of the State List, for example, it is limited only to persons professing the religion of Islam. The use of the word 'any' between the words 'in respect only of' and 'of the matters' means that the State Legislature may choose one or some or all of the matters allowed therein to be included within the

jurisdiction of the Syariah Courts. It can never be that once the Syariah Courts are established the courts are seized with jurisdiction over all the matters mentioned in item 1 automatically. It has to be provided for. At the very least, the law should provide 'and such courts shall have jurisdiction over all matters mentioned in item 1 of List II — State List of the Ninth Schedule.' If there is no requirement for such provision, then it would also not be necessary for the Legislature of a State to make law to 'constitute' and 'organise' the Syariah Courts. Would there be Syariah Courts without such law? Obviously none. That is why such law is made in every State eg Administration of Islamic Law Enactment 1989 (Selangor).

(The position in the Federal Territories is the same in this respect even though such law is made by Parliament because such law may only be made 'to the same extent as provided in item 1 of the State List … ' — item 6(e) of the Federal List).

The point to note here is that both courts, Civil and Syariah, are creatures of statutes. Both owe their existence to statutes, the Federal Constitution, the Acts of Parliament and the State Enactments. Both get their jurisdictions from statutes ie Constitution, Federal law or State law, as the case may be. So, it is to the relevant statutes that they should look to determine whether they have jurisdiction or not. Even if the Syariah Court does not exist, the Civil Court will still have to look at the statutes to see whether it has jurisdiction over a matter or not. Similarly, even if the Civil Court does not exist, the Syariah Court will still have to look at the statute to see whether it has jurisdiction over a matter or not. *Each court must determine for itself first whether it has jurisdiction over a particular matter in the first place, in the case of the Syariah Courts in the States, by referring to the relevant State laws and in the case of the Syariah Court in the Federal Territory, the relevant Federal laws. Just because the other court does not have jurisdiction over a matter does not mean that it has jurisdiction over it. So. to take the example given earlier, if one of the parties is a non-Muslim, the Svariah Court does not have jurisdiction over the case even if the subject matter falls within its jurisdiction. On the other hand, just because one of the parties is a non-Muslim does not mean that the Civil Court has jurisdiction over the case if the subject matter is not within its jurisdiction. So. there mav be cases over which neither court has jurisdiction. It may be said that it cannot be so. In mv view, it can be so. because either court obtains its jurisdiction from statute, not from the fact that the other court does not have jurisdiction over the matter.* (Emphasis added.)

[30] As the judgment shows, the issue is not really one of which court has the jurisdiction to grant the remedy prayed — on the facts of this case, for example, which court has the jurisdiction to grant an order of declaration? There has to be two levels of judicial enquiry — first, at the level of legislative competency, and secondly, at the level of the jurisdiction of the courts. Although both are statutory creations, no jurisdiction can be conferred by Federal law on the civil courts on matters which are within the legislative competency of the states, and vice versa.

[31] In this regard, we wish to highlight another decision of our Court of Appeal in *Wan Khairani binti Wan Mahmood v Ismail bin Mohamad & Anor* [2008] 1 MLJ 164, where the Court of Appeal held:

> … when there is a challenge to jurisdiction, as here, the correct approach is firstly to see whether the Syariah Court has jurisdiction and not whether the State Legislature has power to enact the law conferring jurisdiction on the Syariah Court …. The question that may flow from the judgment of Abdul Kadir Sulaiman J, which we agree, would be what happens when a party may not have his remedy expressly stated in the State law pertaining to Muslim? The answer, in our view, is not for the courts to legislate and confer jurisdiction to the Civil Courts but for the State Legislature to provide the remedy. The role of the courts is to interpret the laws and whenever necessary to give effect to the purpose or object of the laws enacted by the legislatures … We need therefore to give effect to the purpose or object of the amendment to art 121 of the Constitution. As correctly stated by Abdul Kadir Sulaiman, J (in *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan)* for which we agree, we requite what his Lordship said: The fact that the plaintiff may not have his remedy in the Syariah Court would not make the jurisdiction exercisable by the Civil Court.

[32] *Wan Khairani binti Wan Mahmood*, is a case of competing jurisdictions between the civil court and the Syariah Court. At issue was the distribution of *harta sepencarian* between a divorced couple where part of the challenged assets comprised of lands (later compensation monies, when the lands were acquired by the state authority) bought by a company in which the former wife was the minority shareholder and the former husband the majority shareholder. It was alleged that when the lands were purchased the husband held the lands on trust for the company. A *harta sepencarian* claim had been earlier commenced in the Syariah Court before the former wife instituted a derivative action under company law in the civil courts to injunct the former husband (and majority shareholder) from dissipating the monies and to transfer these monies comprising proceeds from the sale of the land to the company. The institution of the civil suit in the civil court was challenged for duplicity and abuse of process. The Court of Appeal took the view that it was essential to determine the 'core' of the dispute before the civil court, which did not have anything to do with the practice of Islam but more to do with the practice of companies. The civil claim was construed not as conflicting but instead as assisting the claim for harta sepencaraian in the Syariah Court.

[33] In our view, a resolution of the present appeal can be approached on a similar basis, with a full appreciation that given the structure of our Federal Constitution, there could very well be areas of perceived overlapping jurisdictions between the Syariah and the civil courts. The essential issue to determine is what precisely is the 'core' or putting it slightly differently, the 'pith and substance' of the disputed subject matter, not so much whether the civil courts have the correct and applicable remedy.

[34] On the facts of this present appeal, the dispute is on the relatively mundane issue of whether the termination of the respondent as the *Pengerusi*

Jawatankuasa Kariah Masjid Al-Aulia is lawful. It has little to do with Islamic law in connection with mosques. It does not even concern the qualifications of a person to act as *Imam* or *Bilal* under Islamic law, for the respondent is not one. The subject matter concerns the administration of a mosque no doubt, but the 'pith and substance' is one of administrative law, for which the civil courts are the proper fori.

[35] We therefore uphold the decision of the learned judicial commissioner on this first question of jurisdiction, although on different grounds.

[36] We now turn to the second question of whether proper procedure has been followed, namely the issue whether the respondent should have proceeded by way of a judicial review application under O 53, instead of a writ action.

THE PROPER PROCEDURE ARGUMENT

[37] In the earlier part of this judgment, we have noted how the learned judicial commissioner had considered the two High Court decisions in *Kamal Ariff bin Hj Abdul Rahim v Majlis Agama Islam Negeri Pulau Pinang* [2011] 4 MLJ 102, and *Barkath Ali bin Abu Backer v Anwar Kabir bin Abu Backer & Ors* [1997] 4 MLJ 389, and *Kamal Ariff bin Hj Abdul Rahim v Majlis Agama Islam Negeri Pulau Pinang*, in particular, is said to be 'on all fours' with the facts of this present appeal.

[38] We have demonstrated in the earlier section on the jurisdiction argument what exactly is involved in this appeal. This is not a termination of employment case; the respondent is claiming for a declaration of a mere 'status', ie that he remains the lawful *Pengerusi Jawatankuasa Kariah Masjid* by reason of his appointment having been terminated by the wrong body (JAIP instead of MAIP) and failure of natural justice. At any rate, the respondent has not pleaded his case as an unlawful termination of employment of contract of service. In *Kamal Ariff bin Hj Abdul Rahim*, the plaintiff was an administrative officer employed with Majlis Agama Islam Pulau Pinang who alleged that the termination of his service was unlawful and, inter alia, claimed damages for wrongful dismissal. This was essentially a case of breach of contract, a matter of private law and a matter of loss of private livelihood. The facts, with respect, are not 'on all fours'; they are fundamentally different. Nor do we believe the mere inclusion of a prayer for a declaratory order can translate a matter of public law into a matter of private law. It will be extremely easy then for any aggrieved person in an issue of public law, to sidestep the rigours of O 53 by the simple expedient of including a prayer for a declaration.

[39] Another aspect of the argument in favour of allowing a claim to be

brought by writ is premised on the argument that the jurisdiction to grant a declaratory order is wide subject only to the court's discretion. The two cases cited by the learned judicial commissioner are both cases decided before amendments were made to O 53. As the Rules of the High Court 1980 stood at the time of the hearing before the High Court, a declaratory order may even be added as a relief prayed for in an application for judicial review. So there can be no question of any injustice on account of an action brought by writ or originating summons for a declaration being struck out by reason of a wrong procedure being used. We refer in this regard to O 53 r 2(2) and (3), as amended, to demonstrate the point:

> (2) An application for judicial review may seek any of the said reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.
>
> (3) Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation.
>
> Provided always that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1948 and section 54 of the Specific Relief Act 1950.

[40] The approach to be adopted to the private law/public law dichotomy has been authoritatively laid down by the Federal Court in *Ahmad Jefri bin Mohd Jahri @ M Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145, such that it is no longer really necessary to expand time and space on whether the principles of *O'Reilly v Mackman and others and other cases* [1982] 3 All ER 1124, applies in Malaysia and to what extent.

[41] It is now established that O 53 sets out a specific procedure for an aggrieved person to seek a remedy against a public authority for an infringement of a right protected under public law. It sets out a leave requirement and a time requirement as a matter of public policy. The conditions are stringent, but there are compelling public policy reasons for these, as described by the Federal Court:

> One may ask what is the purpose of these conditions? The basic objective is to protect those entrusted with the enforcement of public duties 'against groundless, unmeritorious or tardy harassment that were accorded to statutory tribunals or decision making public authorities by O 53, and which might have resulted in the summary, and would in any event have resulted in the speedy disposition of the application, is among the matters fit to be taken into consideration by the judge in deciding whether to exercise his discretion by refusing to grant a declaration … as described in the celebrated case of *O'Reilly v Mackman and others and other cases* [1982] 3 All ER 1124 at p 1133. Further, there is also the need to reduce the delay in resolving such application in the interest of good administration. As Lord

> Diplock in *O'Reilly v Mackman* reiterated, The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.

[42] It is also an established proposition that a failure to comply with O 53 results in an abuse of process for which the claim can be struck out.

[43] There could nevertheless be exceptions to the rule, such as where the dispute evidently involves a private law matter or where the plaintiff is asking for a declaration of status, or where the elements of public and private laws are present but the element of private law is more predominant. In any event, each case is very much 'fact based'. This is how the Federal Court has analysed the issues:

> We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O 53 of the RHC is not suitable. Aside from this, there could be other circumstances like the kind in YAB Dato' Dr Zambry. Much depends on the facts of the case. But generally the court should be circumspect in allowing a matter which should be by way of O 53 of the RHC to proceed in another form. To say that it is open to any applicant seeking judicial review to elect any mode he prefers, as implied in Kuching Waterfront, would, in our considered opinion, be rendering O 53 of the RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration then this rule must be adhered to except in the limited and exceptional circumstances discussed.

[44] Based on these principles and the exhortation that a court has to be circumspect in allowing a public law matter to be proceeded by a procedure other than an application for judicial review, and considering the total circumstances of this case and the nature of the respondent's claim, although couched in the language of applying for a declaration of 'status', we are of the considered opinion that this is a case that should have been filed as an application for judicial review under O 53 of the Rules of the High Court 1980. There is absent any significant private law element, and is almost wholly exclusively centred on a public law argument on absence of statutory

jurisdiction (on the part of JAIP) and breach of the rules of natural justice. In the circumstances, and for these reasons, we are constrained to depart from the decision of the High Court, and to therefore set aside the order of the judicial commissioner. We therefore allow the appeal, and order that there shall be an order recorded in terms as prayed in encl 7 (summons in chambers dated 18 November 2011) prayer 1 thereof.

[45] We are not making any order as to costs against the respondent since this appeal involves a public interest element.

Appeal allowed.

Reported by Afiq Mohamad Noor